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IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-

Norfolk and Western Railway Company,
a Corporation,

Petitioner,

vs.

Kandythe J. Liepelt, Administratrix
of the Estate of Delroy Liepelt, Deceased,

Respondent.

Petition for a Writ of Certiorari to the Appellate Court of Illinois, First District, First Division

HOWARD J. TRIENENS
SIDLEY & AUSTIN
Suite 4800
One First National Plaza
Chicago, Illinois 60603
(312) 329-5400

ROBERT L. LANDESS
TOBIN M. RICHTER
ROSS, HARDIES, O'KEEFE,
BABCOCK & PARSONS
One IBM Plaza, Suite 3100
Chicago, Illinois 60611
(312) 467-9300

Attorneys for the Petitioner

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INTRODUCTORY STATEMENT

Norfolk and Western Railway Company petitions this Court for a writ of certiorari to review the judgment and opinion of the Appellate Court of Illinois, First District, First Division.

OPINION BELOW

The opinion of the Appellate Court of Illinois, First District, First Division is reported at 62 Ill.App.3d 653, and at 378 N.E.2d 1232 (1978), and is appended hereto at pages A1 to A26. The order and mandate of the Supreme Court of Illinois denying Petitioner's Petition for Leave to Appeal appears at pages A27-A28.

JURISDICTION

The judgment of the Appellate Court of Illinois, First District, First Division was entered on July 5, 1978. Petitioner's timely Petition for Leave to Appeal was denied by the Supreme Court of Illinois on November 30, 1978 and this Petition for Certiorari was filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. §1257(3).

QUESTIONS PRESENTED

It is settled that the measure of damages in state as well as federal court actions under the Federal Employers' Liability Act (FELA) is the amount that the claimant could reasonably have expected to have been applied to his benefit if the accident had not occurred. This case presents two closely related questions concerning whether a court's refusal to allow the trier of fact to consider the effect of income taxation violated this basic principle of damages:

1. Whether, in a FELA case in which income taxation would have substantially reduced the income available to a claimant if the accident had not occurred, a court may, by excluding all evidence of income taxes that the injured party would have paid on his projected lost earnings, require that damages calculations be based on the injured party's estimated *gross* income?

2. Whether, despite the likelihood that a jury would erroneously assume that a damages award is taxable, inflate its verdict to assure full compensation after payment of an imagined tax, and thus overcompensate the plaintiff, the trial court in a FELA action may refuse to advise the jury that under existing tax laws the damages award is not subject to income taxation?

STATUTES INVOLVED

35 Stat. 65, as amended, 45 U.S.C. §51.

"Liability of common carriers by railroad, in interstate or foreign commerce, for injuries to employees from negligence; definition of employees.

"Every common carrier by railroad while engaging in commerce between any of the several States or Territories, or between any of the States and Territories, or between the District of Columbia and any of the States or Territories, or between the District of Columbia or any of the States or Territories and any foreign nation or nations, shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, or, in case of the death of such employee, to his or her personal representative, for the benefit of the surviving widow or husband and children of such employee; and, if none, then of such employee's parents; and, if none, then of the next of kin dependent upon such employee, for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment."

26 U.S.C. §104(a)(2), Int. Rev. Code of 1954 §104(a)(2).

"Except in the case of amounts attributable to (and not in excess of) deductions allowed under Section 213 (relating to medical, etc., expense) for any prior taxable year, gross income does not include — . . . (2) the amount of any damage received (whether by suit or agreement) on account of personal injuries or sickness . . . ."

STATEMENT OF THE CASE

Respondent, who is administratrix of the estate, instituted this action in an Illinois state court under the Federal Employers' Liability Act, 45 U.S.C. §51, to recover damages for the death of her decedent, Delroy Liepelt, a resident of Ohio, who had been killed in a collision at Wyatt, Indiana, in November, 1973, while working as a fireman for petitioner railway company.

At trial, respondent introduced evidence both of petitioner's negligence—which is no longer in issue—and of the monetary value of the loss she and decedent's children had incurred as a result of his death. An economist, Dr. Bernard Friedman, supplied the critical testimony on damages. Record (R) at 667-710. He stated that Liepelt, who had been earning approximately $13,000 per year at the time of his death, had had a life expectancy of a little over 34 years in 1973. Friedman further testified that, but for Liepelt's death, his annual earnings would have, under the collective bargaining agreement in effect, increased to approximately $16,800 by 1977, which was the date of the trial, and Friedman projected that Liepelt's earnings would have continued to increase at a rate of at least 5% per year for the remaining twenty-four years of his working life (R 684), thus reaching an annual salary of at least $36,000 by the time of decedent's projected retirement in the year 2000. To compute the pecuniary loss to decedent's widow and four children, Friedman aggregated these projected gross earnings, added the value of decedent's household services (which Friedman stated would be 9% of his gross income), subtracted the amounts decedent would have spent on himself (which was either 10% or 31% of his gross earnings, depending on the period of Liepelt's life), and reduced that sum to present value, arriving at a figure of $302,000. (R 684-94.)

At the close of the trial, the judge instructed the jury that each survivor's damages would be the pecuniary benefits "it might reasonably be expected each survivor would have received from the decedent, if the decedent had not met his death." (R 1425.) In making this computation, the jury was instructed to consider "what the decedent was earning and what he would have been likely to earn in the future" and also "the personal expenses of decedent and other deductions from his earnings." (R 1424.) The judge further instructed that the jury could compensate decedent's children for loss of guidance but could not award any sum for "grief or loss of society and companionship." (R 1425.) The Court refused to instruct the jury that any damages award would be nontaxable. The jury returned a verdict of $775,000.

HOW THE FEDERAL QUESTIONS WERE PRESENTED

Petitioner asserted its interrelated federal claims at every level of the Illinois court system.

At trial, prior to calling Dr. Friedman, respondent's counsel made an oral motion that petitioner be prohibited from mentioning income taxes in its cross-examination. (R 664–65; A28-A29.) When petitioner later stated its intention to cross-examine Friedman concerning the nontaxability of the award, the judge prohibited the questioning, stating that the subject of income taxation could not be referred to in the presence of the jury. (R 710–713; A29-A31.) After Friedman was excused, petitioner moved for mistrial, arguing that substantial amounts of decedent's lost earnings would have been paid in taxes and thus would have been unavailable to his beneficiaries if he had lived and that it was entitled to place before the jury evidence that an award would not be taxable. The judge, however, reaffirmed the earlier ruling that any reference to the impact of income taxation was impermis-

sible. (R 738–758; A31-A35). In light of these rulings, petitioner did not, during the presentation of its case in chief, call any witnesses on these points, but rather made an offer of proof that, but for the judge's rulings, petitioner would have called as a witness an actuary, Dr. Robert Barnes, who would have testified that state and federal taxation would have reduced petitioner's projected earnings by some $57,000 and that the pecuniary loss to decedent's survivors was either $138,327 or $115,325, depending on the rate of discounting. (R 1091-93; A35-A36.) Finally, at the close of the evidence, petitioner requested an instruction concerning the nontaxability of the award, which instruction was denied. (R 1263, RC 200; A37.)[1]

In the Illinois Appellate Court, petitioner again presented its federal claims. Petitioner's appellate brief (pp. 6, 47–61) argued that the trial court had erred by refusing to follow federal law and permit the jury to consider the impact of income taxation both on the decedent's lost earnings and on the damages award. The Illinois Appellate Court held against petitioner on both questions, stating in its opinion:

> "Defendant also claims as error the trial court's refusal to instruct the jury as to the nontaxability of a damage award; to allow cross-examination of plaintiff's economist as to the nontaxability of an award; and, to allow defendant to introduce evidence as to the effects of income taxes on the decedent's future earnings. Numerous federal cases have been cited by defendant and *amicus* American Trial Lawyers Association. From a review of these cases it is apparent that the Courts of Appeals differ on the question of whether it is proper to instruct the jury as to the nontaxability of an award or to allow evidence as to the effects of taxation on future earnings. Compare *Burlington Northern Inc.* v. *Boxberger* (9th Cir. 1975), 529 F.2d 284, with *Johnson* v. *Penrod Drilling Co.* (5th Cir. 1975), 510 F.2d 234, *cert. denied*, 423 U.S. 839.
>
> "The Supreme Court of the United States has not spoken on this issue. Absent an authoritative pronouncement by that Court we will follow the decisions of our own supreme court in *Raines* v. *New York Central R.R. Co.* (1972), 51 Ill.2d 428, 430, 283 N.E.2d 230, *cert. denied* 409 U.S. 983, and *Hall* v. *Chicago & North Western Ry. Co.* (1955), 5 Ill.2d 135, 149-52, 125 N.E.2d 77, cited in *Saunders* v. *Norfolk & Western Ry. Co.* (1977), 54 Ill.App.3d 307, 316, 369 N.E.2d 518. These decisions hold that it is not error to refuse to instruct a jury as to the nontaxability of an award. Based on these decisions we also conclude that it is not error to exclude evidence of the effect of income taxes on future earnings of the decedent. These contentions are therefore rejected." (A22-A23.)

The tax questions were again raised before the Appellate Court in the Application for a Certificate of Importance filed by the petitioner with that court on August 9, 1978. When the latter was denied, petitioner filed a Petition for Leave to Appeal with the Illinois Supreme Court which stated (p. 3):

> "4. The Appellate Court erroneously refused to follow controlling decisions by federal courts which require introduction of evidence of the impact of taxation on the future earnings of a decedent, where, as was the case here, the amount of taxation would have a significant impact on net earnings.
>
> "5. The Appellate Court erroneously refused to instruct the jury that the award of damages to plaintiff is not subject to taxation."

That Petition was denied by the Illinois Supreme Court on November 30, 1978 (A27). Thus, the Illinois Court of Appeals, First Department, First Division, is the "highest court in [the] state in which decision could be had." 28 U.S.C. §1257.

[1] Petitioner also raised its two federal claims in a post-trial motion submitted to the trial court. R C261H-C261I.

REASONS FOR GRANTING THE WRIT

There are few federal questions that have so divided state and federal appellate courts as has that of the treatment of income taxation in damages computations under the Federal Employers' Liability Act. Two distinct, but related, problems have arisen.

The first pertains to the measure of lost earnings. Should these be based on estimated future *net* earnings, after deducting income taxes, or on probable future *gross* earnings? Or should the answer vary depending on the extent to which earnings were likely to have been taxed? The position of the Illinois courts is that no matter how greatly income taxation would have reduced a claimant's disposable income if there had been no accident, lost earnings are to be based on estimated *gross* earnings. The second problem, which arises because personal injury damages awards are not taxed, *see* 26 U.S.C. §104(a)(2), is whether juries should be given a cautionary instruction that the judgments are tax free. Again, the Illinois courts have held that regardless of the likelihood that a jury might erroneously assume its verdict is taxable and seek to compensate the claimant for an imagined tax, no such instruction need be given. While other courts agree with Illinois on both points, there is very substantial authority to the contrary.

Last term, this Court granted certiorari in a case which presented both these questions, and in which the lower court had agreed with the rulings of the Illinois Appellate Court, *Rediker* v. *Chicago, Rock Island and Pacific R. Co.*, 1 Kan. App.2d 581, 571 P.2d 70 (1977), *cert. granted*, 435 U.S. 922 (No. 77-1000),[2] but that case was settled by the parties and

[2]Included in the questions presented in that case (Petition for Certiorari, p. 3) was:

(footnote continued on next page)

dismissed pursuant to Supreme Court Rule 60. The same considerations that were before this Court when it granted certiorari in *Rediker* are presented by this case.

1. Federal Law Determines the Treatment of Income Taxation in FELA Damages Computations.

Over half a century ago, this Court prescribed that the measure of damages in FELA wrongful death actions is the amount the decedent's beneficiaries could reasonably have expected to have been applied to their benefit if the decedent had lived. *See Norfolk & Western Ry. Co.* v. *Holbrook*, 235 U.S. 625, 629 (1915); *Michigan Central R.R. Co.* v. *Vreeland*, 227 U.S. 59, 72–73 (1913). These holdings are but an application of the more general principle that "damages for a tort should place the injured person as nearly as possible in the position he would have occupied had the wrong not occurred." C. McCormack, Law of Damages 560 (1935). In implementing this basic federal rule of damages, this Court has required that inconsistent state court practices yield to the uniformity required by the federal act.

Chesapeake & Ohio R. Co. v. *Kelly*, 241 U.S. 485 (1916), illustrates the point. There, a state trial court had refused to instruct a jury to discount to present value an FELA claimant's lost future pecuniary benefits, and the state appellate court affirmed, apparently on the ground that such computations would be too difficult for juries. This Court reversed unanimously. Because the jury had aggregated fu-

> "[Is] the proper measure of damages for future lost wages under the provisions of the Federal Employers' Liability Act, 45 U.S.C. Sec. 1, *et seq.*, [ ] to be an amount determined without regard for the impact of federal and state income taxes on said projected future lost wages and without regard for the lack of any such impact on any verdict returned by the jury for future lost wages."

ture benefits "without taking account of the earning power of the money that [was] presently [ ] awarded," the plaintiff there had received a verdict which was greater than the "pecuniary benefits that would have resulted from the continued life of the deceased" and thus which was contrary to the purposes of damages awards under the FELA. *Id.*, at 489. To ensure that plaintiffs would not be so overcompensated, the Court held that all courts administering the FELA must instruct juries that damages based upon lost future benefits must be based on their present value only.[3]

The questions presented in this case raise the same basic issue concerning the measure of damages under the FELA as was involved in *Chesapeake & Ohio R. Co.* v. *Kelly, supra*. The issue here, stated simply, is whether the Illinois courts' rulings either impermissibly required—by excluding evidence of net earnings after taxes—and impermissibly encouraged—by refusing to give the cautionary instruction—jury verdicts which overcompensated respondent in violation of the FELA. Here, as in *Chesapeake & Ohio R. Co.* v. *Kelly, supra*, federal principles are necessarily controlling.

2. There Is a Conflict Among Both the Federal Courts of Appeals and the State Courts.

A. On the question whether income taxes should be deducted in computing damages in FELA cases, many state courts and several federal courts agree with the Illinois court

[3]This Court's treatment of the measure of FELA damages as a matter of substantive federal law is consistent with a long line of this Court's other decisions under the Federal Employers' Liability Act. *See, e.g., Dice* v. *Akron, Canton & Youngstown R. Co.*, 342 U.S. 359 (1952) (allocation of function between judge and jury is federal question); *Bailey* v. *Central Vermont R.R.*, 319 U.S. 350 (1943) (sufficiency of evidence is federal question); *see generally* Hill, Substance and Procedure in State FELA Actions—The Converse of the Erie Problem?, 17 Ohio St.L.J. 384 (1956).

that FELA claimants (and other federal personal injury claimants) should be allowed to recover the entire amount of the projected lost gross earnings, regardless of the fact that a substantial portion of these earnings would have been paid out in taxes. *See, e.g., Boston & Maine R.R.* v. *Talbert*, 360 F.2d 286, 291 (1st Cir. 1966); *Johnson* v. *Penrod Drilling Co.*, 510 F.2d 234, 236–237 (5th Cir. 1975) (*en banc*) (Jones Act); *Chicago & N.W. Ry. Co.* v. *Curl*, 178 F.2d 497, 502 (8th Cir. 1949); *Rediker* v. *Chicago, R.I. & P.R.R., supra; McGee* v. *Burlington Northern Inc.*, Mont. , 571 P.2d 784, 790–91 (1977); *see also Varlack* v. *SWC Caribbean, Inc.*, 550 F.2d 171, 177–178 (3rd Cir. 1977) (allows deduction for taxes paid on past lost earnings but not for those paid on future lost earnings); *see generally* Annot., 63 A.L.R.2d 1393, 1398 (1959) and later cases in A.L.R.2d Supp. Service.

However, an equal number of federal courts of appeals and several state courts have rejected this view. Where, as here, such taxes would have had a substantial and significant effect on the amount of lost earnings,[4] they require a reduction for income taxation. *See, e.g., LeRoy* v. *Sabena Belgian World Airlines*, 344 F.2d 266, 276 (2d Cir. 1965), following *McWeeney* v. *New York, N.H. & H.R.R. Co.*, 282 F.2d 34 (2d Cir. 1960); *Petition of United States Steel Corp.*, 436 F.2d 1256, 1273–74 (6th Cir. 1970) (Death on High Seas Act); *Cox* v. *Northwest Airlines, Inc.*, 379 F.2d 893 (7th Cir. 1967) (federal maritime law); *Burlington Northern Inc.* v. *Boxberger*, 529 F.2d 284, 287–95 (9th Cir. 1975); *Sanchez* v. *Denver & Rio Grande*

[4]Here, decedent's *past* lost earnings ranged from $13,000 to $16,800 annually, and his *projected future* earnings were from $16,800 to $36,000 per year. Moreover, the excluded evidence here would have shown that taxation would have reduced decedent's lost disposable income by some $57,000 and that the net pecuniary loss therefore would have been reduced to either $138,327 or $115,325, depending upon the discount rate. See A35-A36.

W. R.R., 538 F.2d 304 (10th Cir. 1976); *Geris* v. *Burlington Northern Inc.*, 277 Or. 381, 561 P.2d 174 (1977). At least one court has further suggested that there should be a deduction for income taxes in all cases, not just those in which taxation would have a substantial effect. *See Burlington Northern Inc.* v. *Boxberger*, *supra*, at 294.

B. On the question whether juries should be given cautionary instructions concerning the nontaxability of damages awards, there is also a deep division. A number of courts take the position that the instruction is not required. *E.g.*, *McWeeney* v. *New York, N.H., & H.R.R. Co.*, *supra*, at 39; *New York Central R.R. Co.* v. *Delick*, 252 F.2d 522, 527 (6th Cir. 1958); Annot., 63 A.L.R.2d 1393, 1398 (1959) and later cases in A.L.R. Supp. Service; *see Nichols* v. *Marshall*, 486 F.2d 791, 794 (10th Cir. 1973); *Elston* v. *Shell Oil Co.*, 481 F.2d 608 (5th Cir. 1973). But at least two courts of appeals have held that because of the dangers that exist when such cautionary instructions are not given, they are required. *See Burlington Northern Inc.* v. *Boxberger*, *supra*, at 295–98; *Domeracki* v. *Humble Oil & Refining Co.*, 443 F.2d 1245, 1248–52 (3rd Cir. 1971) (federal maritime law).

3. The Decision Below Is Contrary to Applicable Decisions of This Court and Is Erroneous.

Both aspects of the decision below are contrary to this Court's holdings in *Chesapeake & Ohio R. Co.* v. *Kelly*, *supra*, and *Norfolk & Western Ry. Co.* v. *Holbrook*, *supra*, that damages in a FELA wrongful death action is to be the amount the decedent's beneficiaries could reasonably have expected to have been applied to their benefit if the decedent had lived, *and no more*.

A. First, by excluding all evidence relating to the taxes that the decedent would have paid on the projected earnings,

the Illinois Courts assured that the damages awarded respondent were substantially more than her due. If the accident had not occurred, Liepelt plainly would have paid a substantial percentage of his gross earnings to state and federal governments in taxes. These substantial sums could never have been made available to Liepelt's beneficiaries if he had lived. However, by making gross earnings the basis for the jury calculations, the evidentiary rulings of the Illinois courts required the jury to include the amounts that would have been paid out in taxes in the damages award. These rulings thus constituted a clear violation of federal damages policy.

Although a number of justifications have been advanced in support of the Illinois courts' position, none are either persuasive on their own terms or sufficient to justify ignoring the effect of income taxation where, as here, it would have substantially reduced a decedent's disposable income. The primary objection to permitting juries to make adjustments for future tax liability is that it involves too much speculation and uncertainty. The rebuttal of Professors Harper and James is unanswerable on this point.

> "[T]he argument is weak. In the first place it has no proper application to damages for *past* losses. In measuring them the tax can be computed and should be deducted. Moreover future taxes are no more speculative than many other items that go into prophecies about future losses in this uncertain world of ours—witness the future earnings of a young child or the future trends in the dollar's value. As long as our system stays wedded to the single lump sum recovery, our courts simply have to speculate about the uncertainties of the future. With anything as sure as "death and taxes" the courts are avoiding their responsibilities when they decline to make the best guess they can, once all the reasonably avail-

able evidence is brought before them." II F. Harper & F. James, Law of Torts §25.12 (1956) (footnotes omitted).

A related contention is that an average jury would find calculation of tax liability unduly difficult. This argument has even less force than did the claim, rejected in *Chesapeake & Ohio Railway Co.* v. *Kelly, supra*, that the reduction of future earnings to its present value required such a difficult computation for the average juryman that it was better to overcompensate FELA claimants than to impose the task on the jury. Today's jurors have had personal experience in determining income tax liability, and with the aid of such competent expert testimony as may be received, they would find it far easier to perform that task than to, *e.g.*, make many liability determinations or perform other aspects of the required damages computation. *See Burlington Northern Inc.* v. *Boxberger, supra*, at 293.

Finally, it has been urged that failure to make adjustments for income taxation is offset by two factors jurors do not consider: future inflation and plaintiff's attorney fees. As to inflation, its effects were implicitly included in the calculation here because the jury was told that the expert's calculations included a 5% annual wage increase. As to plaintiff's attorney fees, these simply have no relevance to the measure of FELA damages. Moreover, were it an objective of our law to compensate successful parties for the expense of vindicating their rights—which it is not, absent an explicit congressional directive, *see Alyeska Pipeline Co.* v. *Wilderness Society*, 421 U.S. 240 (1975)—to refuse to allow deductions for taxation would be an exceedingly clumsy means of achieving it, as the amount of fee reimbursement would depend on the decedent's tax situation.[5]

[5]An additional argument that has been advanced is that the jury's deduction of income taxes would somehow nullify congres-

(*footnote continued on next page*)

In light of these and other considerations, numerous commentators, in addition to the many courts already cited, have disapproved the gross earnings measure of damages adopted by the Illinois courts.[6] In this connection, it bears noting that, in 1955, the English House of Lords overruled its longstanding rule that the income tax consequences are irrelevant to the measure of tort damages. *See British Transport Commission* v. *Gourley*, [1956] A.C. 185.

B. Second, by refusing to require that the jury be given a cautionary instruction that the damages award is not taxable, the Illinois courts created a significant, wholly independent risk that the jury would overcompensate the beneficiaries. In a tax-conscious modern world like ours, it is probable that a jury will, in the absence of an instruction, erroneously assume that a personal injury judgment, like most other receipts of money, is taxable to the recipient. A danger clearly exists that the jury might proceed to award the plain-

sional intent to afford a tax benefit. *See Rediker* v. *Chicago, R.I. & P.R.R., supra*, 571 P.2d at 76. The only benefit Congress intended was to make lump sum damages awards—which would have been taxable in the tax year received—tax free. There simply is no basis for a claim that 26 U.S.C. §104(a)(2) or any other provision was intended to affect the measure of tort damages. Indeed, by making the aggregated lost earnings tax free, Congress invited, if it did not compel, the deduction of income taxes to ensure that the lost earnings component of a damages award would not overcompensate the plaintiff.

[6]*See* II Harper & James, Law of Torts §25.12 (1956); Nordstrom, Income Taxes and Personal Injury Awards, 19 Ohio St.L.J. 212 (1958); Burns, A Compensation Award for Personal Injury or Wrongful Death is Tax-Exempt: Should We Tell the Jury?, 14 DePaul L.Rev. 320 (1965); Morris & Nordstrom, Personal Injury Recoveries and the Federal Income Tax Law, 56 A.B.A.J. 274 (1960); Stripp & Rowland, Taking Account of the Impact of Income Taxes in Personal Injury and Wrongful Death Cases—Recent Developments, 36 Ins.Counsel J. 231 (1969); Note, 50 Ky.L.Rev. 601 (1962).

tiff an additional amount to compensate for an imagined tax. In the present case, there is every reason to believe that precisely this occurred. Although respondent's expert had testified that the pecuniary loss resulting from decedent's death was $302,000, the jury returned a verdict of $775,000. Respondent had, it is true, also sought damages for lost guidance to decedent's children, but it is difficult to imagine a jury awarding $573,000 for the latter, while only $302,000 for the former. The likely explanation for the verdict is that this jury settled on an award substantially less than $775,000 but, believing plaintiff would be taxed, inflated the award to ensure full "after tax" compensation.

Whether such a scenario is characterized as probable or merely as reasonably likely, what should be dispositive is that there was no reason whatsoever not to have given the cautionary instruction that would have eliminated altogether the risk of such a distortion in the size of the verdict. As numerous commentators[7] and at least two federal courts of appeals have recognized, *see Burlington Northern Inc.* v. *Boxberger, supra; Domeracki* v. *Humble Oil & Refining Co., supra*, the benefits of apprising the jury of the true tax consequences are so clear and the burden in terms of time and the possibility of confusion are so minimal that the cautionary instruction should be mandatory.

[7]See II Harper & James, Law of Torts §25.12, at 1327–28 (1956); Burns, A Compensation Award for Personal Injury or Wrongful Death is Tax-Exempt: Should We Tell The Jury?, 14 DePaul L.Rev. 320 (1965); Feldman, Personal Injury Awards: Should Tax Exempt Status Be Ignored?, 7 Ariz. L.Rev. 272 (1965); Henderson, Some Recent Decisions on Damages: With Special Reference to Questions of Inflation and Income Taxes, 40 Ins.Council J. 423 (1973); Morris, Should Juries in Personal Injury Cases Be Instructed that Plaintiff's Recoveries Are Not Income Within the Meaning of the Federal Tax Law?, 3 Defense L.J. 3 (1958); Nordstrom, Income Taxes and Personal Injury Awards, 19 Ohio St.L.J. 212 (1958);

(*footnote continued on next page*)

4. The Questions Are Important.

Until recently, the question of the treatment of income taxation in measuring FELA damages was largely an academic one. In the half century following the enactment of the FELA in 1908, it was the rare case in which the resolution of these issues could have had a significant effect on the size of a claimant's judgment. Employees' wages were generally too low to be taxed, and even when subject to taxation, the amounts involved were so minimal that it produced relatively little interference with federal damages policy for courts to preclude juries from considering the impact of taxation. In the past several decades, however, these questions have acquired enormous practical importance for FELA litigants. Because wages have increased steadily, without any corresponding upward adjustment in tax schedules, nearly every wage earner now pays a substantial percentage of his income in taxes. Because the income tax is progressive, that percentage can be projected to increase with every wage increase. In consequence, in nearly every FELA case that is brought today, the questions presented in this petition have a significant and substantial effect on the exposure to liability of those employers who are subject to the Act.

It is equally clear that if, as petitioner maintains, the courts that prohibit consideration of taxation are impermissibly inflating damages awards, only a decision from this Court can afford relief. Indeed, because the FELA gives

Stripp & Rowland, Taking Account of the Impact of Income Taxes in Personal Injury and Wrongful Death Cases, Recent Developments, 36 Ins.Council J. 231 (1969); 26 Ford L.Rev. 98 (1957); 42 Geo.L.J. 149 (1953); 50 Ky.L.J. 601 (1962); 44 Ky.L.J. 384 (1956); 56 Minn.L.Rev. 503 (1972); 33 Ohio St.L.J. 972 (1973); 32 Tex.L.Rev. 108 (1953); 8 Tulsa L.J. 242 (1972); 4 U.C.L.A. L.Rev. 636 (1957); 25 U.Cin.L.Rev. 395 (1956); 9 Vand.L.Rev. 543 (1956); 11 Wash. & Lee L.Rev. 66 (1954).

plaintiffs extraordinary forum shopping opportunities,[8] which are enhanced because removal of any case is prohibited,[9] it is predictable that most major lawsuits will, until this Court acts, be tried in courts, like those of Illinois, which require the inflated verdicts.

[8]Under the Act, a plaintiff may institute suit in the district of defendant's residence, the district in which the cause of action arose, or in any district in which defendant is "doing business," and the plaintiff may sue in either state or federal court. See 45 U.S.C. §56. Because railroads typically do business in a great many states, a plaintiff may nearly always bring suit in a court where the law concerning taxation is favorable.

[9]See 28 U.S.C. §1445(a).

CONCLUSION

For the same reasons that the writ was granted in *Rediker* v. *Chicago, Rock Island and Pacific R. Co., supra*,—the conflict in the lower courts and the inconsistency of the decision below with the decisions of this Court—the petition for a writ of certiorari should be granted.

Respectfully submitted,

HOWARD J. TRIENENS
SIDLEY & AUSTIN
One First National Plaza
Chicago, Illinois 60603

ROBERT L. LANDESS
TOBIN M. RICHTER
ROSS, HARDIES, O'KEEFE,
BABCOCK & PARSONS
One IBM Plaza
Chicago, Illinois 60611

February, 1979

APPENDICES

OPINION OF THE ILLINOIS APPELLATE COURT

FIRST DIVISION
JULY 5, 1978

77-677

KANDYTHE J. LIEPELT,
Administrator of the Estate of
DELROY LIEPELT, Deceased,
Plaintiff-Appellee,

vs.

NORFOLK AND WESTERN RAILWAY
COMPANY, a corporation,
Defendant-Appellant.

APPEAL from the Circuit Court of Cook County; the Hon. REGINALD J. HOLZER, Judge, *presiding.*

Mr. PRESIDING JUSTICE GOLDBERG delivered the opinion of the court:

Kandythe Liepelt (plaintiff), as administrator of the estate of her husband, Delroy Liepelt, deceased, brought this action under the Federal Employers' Liability Act to recover damages from his employer, Norfolk and Western Railway Company (defendant), for his death in the course of duty. A jury awarded plaintiff $775,000. Defendant appeals.

Defendant contends that the trial court erred: in denying defendant's motion to dismiss the action on the ground of *forum non conveniens;* in allowing the jury to consider an Indiana statute as evidence of negligence since that statute had been preempted by federal action; in directing a verdict for plaintiff on the issue of contributory negligence; in refusing its instructions on sole proximate cause; in deeming certain

facts admitted and in prohibiting the defendant from explaining those facts at trial; in refusing to allow the jury to consider the impact of federal income taxation on the issue of damages; in instructing the jury that it could award damages for loss of care and guidance for the children of the deceased when no evidence of the value of these services was presented; and that the damages are excessive.

The evidence shows that on November 22, 1973, the decedent was working as a fireman on a freight train owned and operated by the defendant. On that day, decedent was on board defendant's train, Extra 2917, travelling from Montpelier, Ohio, to Chicago. The train was made up of 140 cars and was approximately 1½ to 2 miles long. It was pulled by three diesel locomotives. The decedent rode in the cab of the lead locomotive with the engineer, Owen Perkins. The decedent sat on the left side of the cab and Perkins sat on the right. The remaining members of the crew were Macadoo Maynard and Terry Northrup, brakemen; Clayton Manly, flagman, and Roger Shepard, conductor. Maynard and Northrup rode in the second locomotive and Manly and Shepard rode in the caboose.

Defendant's rules require that whenever a third seat is available in the lead locomotive a brakeman is required to ride there. One of his duties is to act as an additional lookout. There was no third seat available in the lead locomotive of Extra 2917. Decedent and the engineer were alone in the cab.

The entire train had been inspected by defendant's personnel before it left Montpelier. It was found to be in good condition. However, there is testimony that all three diesel locomotives "were old and worn out." The diesel engines operate an air compressor which supplies air pressure to

operate the brakes. At the head of the train the pressure was approximately 75 pounds. At the rear of the train the pressure dropped off. A minimum of 60 pounds is required throughout the train for the brakes to operate effectively. Shortly prior to the occurrence Perkins, the engineer, had radioed the caboose concerning "trouble with the air."

Each locomotive has two 200-watt headlights. The beams from these lights must be capable of illuminating the image of a man at least 800 feet in front of the train. There is evidence that the fireman, as well as the engineer, has a duty to keep a lookout as the train proceeds. Levers for applying the brakes are at the right of the cab in front of the engineer. The fireman also has an emergency brake lever on his side of the cab.

The track on which Extra 2917 travelled is a single, main line, maintained and operated by the defendant. In order for two trains travelling in opposite directions to pass each other it is necessary for one of them to enter a parallel track, called a "siding" or "passing track." The train on the passing track is obliged to wait until the other train has passed before re-entering the main track. Entry to these sidings is made possible by a switch at either end of the siding. The switch must be opened manually to permit entry to the siding from the main track.

Between Montpelier and Chicago one such siding is located near Wyatt, Indiana. This siding runs east/west for approximately 4000 feet. It is immediately to the south of the main line track. In addition to being used as a passing track, this siding is connected to an auxiliary track called a "spur." This spur runs adjacent to a grain elevator, enabling grain cars (hopper cars) to be positioned directly under the elevator for loading.

The defendant's rules prohibit the storing of cars on a siding unless "authorized by the superintendent or in emergency. When so obstructed, the train dispatcher must be notified." On November 22, 1973, the siding at Wyatt contained seven loaded hopper cars weighing 690 tons. No authorization had been issued and no emergency existed. The defendant's dispatcher in Montpelier stated that he was aware the Wyatt siding was used to store loaded hopper cars during the busy season. The cars were positioned so that their eastern most end was 198 feet west of the east switch. Thus, there were 198 feet of track separating the east end of these parked hopper cars and the main track.

All switches are equipped with a position indicator or banner from which the train operators can determine whether the switch is open or closed. The testimony concerning the number of banners employed on the east switch at Wyatt is somewhat contradictory. However, it appears from the exhibits and the testimony of Maynard, a brakeman, that the signal consisted of two aluminum banners positioned one above the other on a pole over the switch. The top banner was oblong, 15½ inches wide and 6 inches high. It was covered with red reflectorized paint and stood approximately 7 to 9 feet in the air. The lower banner was 15 inches square and was also red, though not reflectorized.

Both banners faced in the same direction. When the switch was closed the banners would be parallel to the main track and therefore not visible to trains approaching on that track. When the switch was open the banners would turn to face trains approaching from the east. A red signal, therefore, indicated that the switch was open.

There was testimony that the banners on the east switch were dirty from smoke and dust. Maynard testified that he

visited the site of the occurrence "a couple of days" thereafter. The banners were "really dirty" and, in daylight, they could hardly be seen from a distance of 700 feet. The banners had also been partially damaged, apparently by shotgun blasts. Northrup, a brakeman, testified that there were high weeds and brush in the area which made the switch position indicators "hard to see."

The switch itself was padlocked. The lock could not be located the night of the occurrence but was found the following day in a ditch adjoining the track. The lock was jammed in a partially open position and bore marks of an attempt to force it open. The switch itself had been opened and the red banners were facing the westbound traffic. A witness for the defendant testified that he had operated the switch some 3 days prior to the occurrence and found both the lock and the switch to be in good working order. He had locked the switch after its use.

The track in the immediate area of the occurrence was described by witnesses as "rough" and "run down." The ties "were in bad condition" and "many or most" of them were "old, rotten, splitting and cracked." Many spikes were loose. The ballast, which is made up of crushed stone and covers the ties, was in poor condition causing the train to rock "severely" from side-to-side. The speed limit on this stretch of track had been reduced from 50 to 40 miles per hour.

Defendant's track supervisor testified that he inspected the track the day after the occurrence and took no exception to the condition of the track or the visibility of the signal. A brakeman employed by defendant stated that he found no vegetation in the area of the switch when he operated it 3 days prior to the occurrence.

As Extra 2917 approached the Wyatt siding, it was travelling at approximately 32–37 miles per hour. It was early evening, between 5:30 and 6 p.m. There was little light except for a faint glow in the western sky. Terry Northrup, a brakeman, testified that he heard the brakes go into emergency operation. He saw the first locomotive veer sharply to the left and then saw 7 or 8 hopper cars directly in front of it. There was a terrible crash. At the moment of impact the train was travelling at approximately 30 miles per hour. The first hopper car was forced on top of the lead locomotive, shearing the cab. The decedent and the engineer were killed instantly.

The trial court denied defendant's motion to dismiss based upon *forum non conveniens*. Defendant is a Virginia corporation with its principal office in that state. It conducts business in Illinois only as a part of its line running from various points in Ohio to Chicago. The decedent lived in Ohio and his estate is being probated there. The occurrence took place near Wyatt, Indiana, some 90 miles from Chicago.

Defendant's motion was properly supported by affidavit. The affidavit showed that the proposed witnesses lived in Ohio, Indiana, Michigan or Virginia. No occurrence witnesses lived in Illinois. Defendant shows in its brief that 21 witnesses testified of which only 2 lived in Illinois. All other witnesses were obliged to travel to Chicago.

Plaintiff filed an answer to the motion attacking its sufficiency and asserting her right to choice of forum and to trial counsel practicing there. Briefs were filed in the trial court by both sides.

In our opinion, this issue is decided by *Saunders v. Norfolk & Western Ry. Co.* (1977), 54 Ill. App. 3d 307, 369 N.E. 2d 518. That case presents many facts which coincide with the

situation at bar and the doctrine of *forum non conveniens* is given comprehensive treatment. (*Saunders*, 54 Ill. App. 3d 307, 309-12.) It is unnecessary for us to repeat the principles and authorities noted there.

It is sufficient for us to note that although the states have power to apply the doctrine of *forum non conveniens* to actions arising under the Federal Employers' Liability Act, there are strong considerations of policy which confer on plaintiffs in these cases the right and privilege to choose any forum in which the defendant railway is doing business. Furthermore, "[t]he trial court's decision on the motion will be overturned only if the reviewing court finds an abuse of discretion." *Saunders*, 54 Ill. App. 3d 307, 311.

Attempting to weigh and balance all of the factors on both sides, we conclude that the trial court did not abuse its discretion in denying the motion. This result is supported by a review of the record in this case. Able counsel for the defendant presented a spirited and thorough defense. We cannot find any evidence of handicaps or problems arising which hampered the defense because of the choice of forum. We approve the ruling of the trial court in this regard.

The second issue raised by defendant concerns the doctrine of federal preemption. (U.S. Const., art. VI , cl. 2.) At the time of this occurrence, section 1 of the Indiana Switch Light Act (Ind. Code § 8-8-10-1 (Burns 1976) (amended 1977, P.L. 106, § 2)), read:

> "Every steam railroad company operating wholly or partly in the state of Indiana shall place and maintain upon each switch in said state that is connected with the main track a signal light, attached in such manner to the moving panel of such switch that it will indicate safety when such switch is set to such main track, and that will indicate danger when such switch is not set to the main

track. Said light shall be kept brightly burning constantly between the hours of sunset and sunrise, and on such days or parts of days as are dark and foggy."

At trial, plaintiff was allowed to introduce the existence of the Switch Light Act over defendant's objection. Also, as we will later discuss, the trial court included this Act in one of the jury instructions.

In 1970, Congress passed the Federal Railroad Safety Act (45 U.S.C. §§ 421-441 (1972)) (FRSA). Under the FRSA the Secretary of Transportation (Secretary) is authorized to promulgate rules, regulations and standards for all areas of railroad safety. (45 U.S.C. § 431 (1972).) Section 205 of the FRSA (45 U.S.C. § 434 (1972)), concerns the preemption of state laws. That section reads:

> "The Congress declares that laws, rules, regulations, orders, and standards relating to railroad safety shall be nationally uniform to the extent practicable. A State may adopt or continue in force any law, rule, regulation, order, or standard relating to railroad safety until such time as the Secretary has adopted a rule, regulation, order, or standard covering the subject matter of such State requirement. A State may adopt or continue in force an additional or more stringent law, rule, regulation, order, or standard relating to railroad safety when necessary to eliminate or reduce an essentially local safety hazard, and when not incompatible with any Federal law, rule, regulation, order, or standard, and when not creating an undue burden on interstate commerce."

The Secretary adopted a series of rules on track safety standards. (49 C.F.R. § 213 (1976).) Standard 213.135 is entitled "Switches." It contains performance standards for eight distinct aspects of a switch. Subpart (g) of Standard 213.135 states, "[e]ach switch position indicator must be clearly visible at all times." There is no specification of the type of indicator that is to be used.

The doctrine of preemption has been the subject of two recent United States Supreme Court decision. (*Ray v. Atlantic Richfield Co.* (1978), U.S. , 55 L. Ed. 2d 179, 98 S. Ct. 988; *Jones v. Rath Packing Co.* (1977), 430 U.S. 519, 51 L. Ed. 2d 604, 97 S. Ct. 1305.) In both of these cases the court began its analysis of the preemption issue " 'with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress.' " (*Ray*, 98 S. Ct. 988, 994; *Jones*, 430 U.S. 519, 525, both quoting from *Rice v. Santa Fe Elevator Corp.* (1947), 331 U.S. 218, 230, 91 L. Ed 1447, 67 S. Ct. 1146.) In *Ray*, the court further stated that the Congressional purpose may be evidenced in a number of ways, one being where the " 'scheme of federal regulation [is] so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it.' " (98 S. Ct. 988, 994, quoting from *Rice*, 331 U.S. 218, 230.) Both *Ray* and *Jones* point out that even where a particular area is not totally foreclosed to the States, no state law may stand where it would be impossible to comply with both the state and federal regulations or where the state law would frustrate the Congressional purpose. *Ray*, 98 S. Ct. 988, 994, *Jones*, 430 U.S. 519, 525-26.

In the present case we are faced with the explicit declaration of Congress that no state rail safety law shall remain valid after promulgation of a federal regulation covering the same subject matter as that covered by the state law. (45 U.S.C. § 434 (1972).) The limited exception for purely local safety hazards has not been claimed to apply to the Indiana statute. Therefore, the narrow question with which we are faced is whether the Switch Light Act and Standard 213.135(g) cover the same subject matter.

On its face Standard 213.135(g) simply imposes a general requirement of visibility for switch position indicators. It

does not specify the type of indicator that must be used nor does it indicate any design specifications that must be followed.

Thus, in many respects this case is similar to *Chrysler Corp. v. Tofany* (2d Cir. 1969), 419 F.2d 499. That case concerned the National Traffic and Motor Vehicle Safety Act of 1966 (15 U.S.C. §§ 1381–1431 (1972) (Traffic Safety Act)), and Federal Motor Vehicle Safety Standard No. 108 (49 C.F.R. § 371.21 (1969)).[1] Paragraph S3.1.2[2] of Standard 108 provided that "[n]o additional lamp,***shall be installed [on an automobile] if it impairs the effectiveness of the required equipment."

In 1969, Chrysler sought to introduce an additional headlamp, which it called "Super Lite", as optional equipment on certain models of its Dodge line of automobiles. Prior to doing so it had obtained assurance from the National Highway Safety Bureau that the addition of Super Lite did not violate Standard 108. Officials of the States of New York and Vermont, however, sought to prevent the sale in their States of Dodge automobiles equipped with Super Lite. Chrysler objected on the ground that section 103(d) of the Traffic Safety Act (15 U.S.C. § 1392(d) (1972)), precluded all states from enacting auto safety standards which were not identical to existing federal standards covering the same "aspect of performance." Chrysler argued that Standard 108, paragraph S3.1.2 covered the same aspect of performance as the officials of New York and Vermont wished to regulate. Chrysler also argued that the Congressional objective sought to be attained by the passage of the Traffic Safety Act was national

[1]Standard No. 108 has been recodified and amended as 49 C.F.R. § 571.108 (1976).

[2]Paragraph S3.1.2 has been redesignated and amended as paragraph S4.1.3 (1976).

uniformity of auto safety standards and that this objective would be defeated by allowing New York and Vermont to set their own standards in regard to Super Lite.

The Second Circuit held that the purpose of the Traffic Safety Act was to promote highway safety and that nationally uniform safety standards were a means to that end rather than the end itself. (*Tofany*, 419 F.2d 499, 508.) The court felt the need to construe the aspect of performance clause narrowly so as to provide states the opportunity to regulate new products that might be placed on the market before the federal agency had time to certify their safety. The court therefore concluded that paragraph S3.1.2 of Standard 108 covered a different aspect of performance than the standards of New York and Vermont. Accordingly the court held that the state regulations were not preempted by the Traffic Safety Act. *Tofany*, 419 F.2d 499, 511.

Similar reasoning can be applied to the facts before us. Section 101 of the FRSA declares the purpose of that Act to be: "to promote safety in all areas of railroad operations and to reduce railroad-related accidents, and to reduce deaths and injuries to persons***." (45 U.S.C. § 421 (1972).) Although Congress was also concerned with national uniformity of railroad safety standards, the primary legislative concern was safety. In the case before us, as in *Tofany*, a narrow construction of the coverage of the preemption provision will aid in achieving safety by enabling the States to continue in force regulations covering aspects of rail safety not yet covered by the Secretary's regulations.

Standard 213.135(g), the federal regulation before us, is concerned only with visibility, while the Switch Light Act covers indicator design. The Secretary, while authorized to go further in his regulation of rail switches, has chosen not to

do so. There may come a time when the Secretary will choose to enact detailed specifications on all aspects of rail switches in which event the state laws on this subject must give way. "But it will be time to consider such asserted conflicts between the State and Federal Acts when and if they arise. Any such objections are at this stage premature." *Rice*, 331 U.S. 218, 237.

Considerations of time and space make it impossible for us to comment upon each of the many authorities cited on this issue by defendant and the *amici* Railroads. We will, however, comment upon the authorities which we regard as those upon which greatest reliance is placed.

Donelon v. New Orleans Terminal Co. (5th Cir. 1973), 474 F.2d 1108, *cert. denied*, 414 U.S. 855, concerned an attempt by local parish officials to regulate railroad safety. The finding of preemption in that case was limited to preemption of *local* government regulation. The question of the preemptive effect of the FRSA on state legislation was expressly reserved. 474 F.2d 1108, 1113.

National Association of Regulatory Utility Commissioners v. Coleman (3d Cir. 1976), 542 F.2d 11, involved the standards for reporting railroad accidents. (49 C.F.R. § 225 (1976).) The court held that the States were preempted from adopting their own reporting systems. There, however, the federal standards were very specific in their requirements, unlike the general federal standard on switches involved here. In addition, the Secretary expressly stated in Standard 225.1 of the accident reporting standards that the issuance of the federal reporting requirements "preempts States from prescribing accident/incident reporting requirements." (49 C.F.R. § 225.1 (1976).) The absence of any corresponding language in the Track Safety Standards indicates that the Secretary

recognized that these standards did not cover all possible aspects of track safety.

This is further evidenced by Track Safety Standard 213.1 which states that this section contains initial minimum standards covering isolated track conditions. "[A] combination of track conditions, none of which individually amounts to a deviation from the requirements in this part, may require remedial action to provide for safe operations over that track." (49 C.F.R. § 213.1 (1976).) This language indicates to us that the Secretary not only contemplated but encouraged remedial state action in certain areas of rail safety.

We conclude, therefore, that Standard 213.135(g) does not cover the same subject matter as covered by the Switch Light Act and that the latter was not preempted by the former. Consequently, the trial court committed no error in receiving evidence of the Switch Light Act.

Defendant also contends that the trial court erred in reading section 3 of the Switch Light Act to the jury. Section 3 provided for liability for violation of the Act (Ind. Code § 8-8-10-3 (Burns 1976) (repealed 1977, P.L. 106, § 3)):

> "For any violation of or failure to comply with any of the provisions of this act such company shall be liable to all persons and employees injured by reason thereof, and no employee shall, in any case be held to have assumed the risk incurred by reason of such violation or failure."

The defendant contends that this was error in that the FELA preempts section 3 of the Switch Light Act. It cites *Seaboard Air Line Ry. v. Horton* (1914), 233 U.S. 492, 58 L. Ed. 1062, 34 S. Ct. 635, in support thereof.

Also, the trial court instructed the jury that if it found the defendant "violated the [Act] on the occasion in question,

then [it could] consider that fact together with all the other facts and circumstances in evidence in determining whether or not [the defendant] was negligent before and at the time of the occurrence." (From Illinois Pattern Jury Instructions, Civil, No. 60.01 (2d ed. 1971) (hereinafter cited as IPI Civil).) The defendant claims, citing *Northern Trust Co. v. Chicago Rys. Co.* (1925), 318 Ill. 402, 149 N.E. 422, that it was reversible error to read the preempted portion of the statute to the jury coupled with an instruction that the jury could consider the void statute as a basis for liability.

We agree with defendant that the FELA has preempted the liability portion of the Switch Light Act. However, in our opinion, the defendant's reliance on *Northern Trust* is misplaced. That case held that it was reversible error to cite a void statute to the jury coupled with a peremptory instruction. (318 Ill. 402, 414.) A peremptory instruction is one "given by a court to a jury, which the latter must obey implicitly, as an instruction to return a verdict for the defendant, or for the plaintiff, as the case may be." (*Martin v. Kralis Poultry Co.* (1973), 12 Ill. App. 3d 453, 466–67, 297 N.E.2d 610.) In the present case, no peremptory instruction was given on this point. The judge merely instructed the jury that it might consider section 3 along with "all the other facts and circumstances in evidence in determining whether or not [the defendant] was negligent***." IPI Civil No. 60.01.

Furthermore, it is evident from the pleadings that the plaintiff brought her action under the FELA. The trial judge instructed the jury on the issue of liability by reading to them the Illinois Pattern Instruction on liability in FELA cases. (IPI Civil No. 160.02.) We do not believe that by reading section 3 to the jury the trial judge erroneously led the jury to believe that liability could be based on that section

rather than on the FELA. Therefore, even if it was error to cite the preempted section of the statute to the jury, the error was harmless.

The next point raised by defendant concerns the trial court's action in directing a verdict for plaintiff on the issue of contributory negligence. Under the FELA a finding of contributory negligence does not bar recovery as it would in an ordinary negligence action. If the jury makes a finding of contributory negligence, it is required to reduce the damages in proportion to the degree of negligence attributable to the injured party. (45 U.S.C. § 53 (1972).) Also, under the FELA, the burden of establishing contributory negligence is on the defendant. (*Fisher v. Chicago, Rock Island & Pacific Ry. Co.* (1919), 290 Ill. 49, 56, 124 N.E. 831.) "In FELA cases there is a presumption that the deceased was engaged in the performance of his duty and exercised due care for his own safety at the time of his death." *Moore v. Atchison, Topeka and Santa Fe Ry. Co.* (1960), 28 Ill. App. 2d 340, 355, 171 N.E.2d 393.

The evidence relied on by the defendant to show contributory negligence consists of the results obtained from a reenactment of the accident conducted 6 days later by employees of the defendant. The results of these tests were made the subject of requests for admissions which plaintiff served on defendant. The tests showed:

(1) At a point 2,879 feet east of the east end switch the reflectorized banner was barely visible;

(2) At a point 1,777 feet east of the east end switch the reflectorized banner was distinctly visible;

(3) At a point 966 feet east of the east end switch, in the opinion of the observers, the engineer of Extra 2917 would have realized something was definitely wrong and would have placed the train brakes in emergency;

(4) Under normal conditions, Extra 2917 would have been stopped by emergency application of the air brakes in 1,478 feet;

(5) The loaded hopper cars were parked on the siding 198 feet west of the east switch;

(6) The brakes of Extra 2917 were not applied until 569 feet east of the switch.

The defendant also points to evidence that the decedent had a duty to maintain a lookout and to apply the emergency brakes if necessary. One of the emergency brake levers was located on decedent's side of the cab.

The trial judge, however, had much more evidence to consider in deciding this issue. There was testimony by the flagman, Clayton Manly, that the track near Wyatt was "rough and not [in] too good a shape." Terry Northrup, a brakeman, testified that this condition caused a rocking motion and made braking more difficult than on a smooth, well-kept roadbed. Clayton Manly further stated that 15 or 20 minutes prior to the accident the engineer called him and complained of "having trouble with the air." This condition would also affect the braking ability of the train.

Also there was testimony by at least two witnesses that the banners on the switch were dirty from dust and smoke and there were high weeds and bushes near the switch which made the banners difficult to see. Furthermore, the decedent was not primarily responsible for keeping a lookout. As a fireman he was required to keep a lookout only when he was not preoccupied with other duties. It was the engineer who was primarily responsible for operating the train. The decedent had a right to rely on proper performance of this duty by the engineer particularly while the decedent was occupied with his other duties. *Knierim v. Erie Lackawanna R.R. Co.* (2d Cir. 1970), 424 F.2d 745, 747.

In *Taylor v. Atchison, Topeka and Santa Fe Ry. Co.* (1937), 292 Ill. App. 457, 465–66, 11 N.E.2d 610, *cert. denied*, 304 U.S. 560, the court stated:

> "The fireman is merely an assistant acting under the direction of the engineer, and from the character of his duties in keeping up steam by firing, it cannot be said that it is his paramount duty to be on the lookout all the time. As was said in *St. Louis & S. F. R. Co. v. Bishard*, 147 Fed. 496, 'other duties of moment may have demanded his attention elsewhere.' "

Fireman are no longer required to shovel coal to maintain steam, but there are other duties which demand their attention. Terry Northrup testified that about an hour before the accident the decedent left the lead locomotive to inspect the electrical systems of the second and third locomotives. Northrup stated that there was an inadequate amount of electricity to power the drive wheels and that the cab and instrument lights were dim. Decedent made an effort to correct this situation but, according to Northrup, the condition persisted up to the time of the accident. In addition to the electrical problem, there was testimony from Clayton Manly, flagman in the caboose, that the engineer contacted him concerning trouble with the air pressure about 15 to 20 minutes prior to the accident.

Viewing the evidence as a whole, it is impossible to determine exactly what the decedent was doing immediately prior to the accident. However, the evidence strongly suggests that the decedent was occupied with at least two mechanical problems and was therefore unable to maintain a lookout. The defendant did not carry its burden of presenting any evidence to negate this inference and therefore any contrary conclusion would necessarily be pure speculation and conjecture. A finding of negligence cannot be based on such tenuous grounds. (*Tompkins v. Twin Oaks Dairy, Inc.* (1968), 91

Ill. App. 2d 88, 94, 234 N.E.2d 403, *leave to appeal denied*, 38 Ill. 2d 630.) Reviewing all of the evidence presented we conclude the trial court was correct in directing a verdict on the issue of contributory negligence.

Defendant raises an issue on refusal of the trial court to give defendant's tendered instruction on proximate cause. Defendant tendered IPI Civil No. 12.04 which states:

> "More than one person may be to blame for causing an injury. If you decide that the defendant was negligent and that his negligence was a proximate cause of injury to the plaintiff, it is not a defense that some third person who is not a party to the suit may also have been to blame.
>
> "[However, if you decide that the sole proximate cause of injury to the plaintiff was the conduct of some person other than the defendant, then your verdict should be for the defendant.]"

The trial court rejected this instruction and gave plaintiff's version of No. 12.04 which omitted the bracketed language. The defendant claims that the trial court thus precluded it from having the jury instructed on one of its theories of the case, namely that the sole cause of the accident was the conduct of some third person who broke the switch lock and threw the switch.

The Notes on Use accompanying IPI Civil No. 12.04 state that the bracketed language "should be used only where there is evidence tending to show that the sole proximate cause of the occurrence was the conduct of a third person."

Even if we assume *arguendo* that there was sufficient evidence to show that an unrelated third party broke the lock and tampered with the switch, the defendant still could

not claim that this was the sole proximate cause of the accident. Defendant parked seven loaded hopper cars on the Wyatt siding in violation of its own rules and failed to notify the crew of Extra 2917 of this fact. Thus, despite other evidence adduced by plaintiff regarding other possible proximate causation, the evidence shows that if the hopper cars had not been parked on the siding the mishap would not have occurred. The defendant's conduct in failing to keep the siding clear of obstruction and in failing to notify the crew of Extra 2917 of the obstruction created reasonably foreseeable dangers. The record demonstrates that the intervening act of a third party was not the sole cause of the accident. (See *Drell v. American National Bank & Trust Co.* (1965), 57 Ill. App. 2d 129, 139, 207 N.E.2d 101.) The jury was properly instructed in this regard.

Defendant next urges error in the trial court in ruling that the plaintiff's requests to admit certain matters were deemed admitted because of defendant's improper responses. Prior to trial, on December 1, 1975, the plaintiff served upon defendant a request for admissions of certain facts pursuant to Supreme Court Rule 216. (Ill. Rev. Stat. 1975, ch. 110A, par. 216.) The facts sought to be admitted were those obtained by the defendant as a result of its investigation of the accident. An investigation was also conducted by the Federal Railroad Safety Board (FRSB) and certain of the facts sought to be admitted were contained in the FRSB report.

The plaintiff moved to strike the defendant's initial responses because they did not contain the detailed answers required by Rule 216(c). (Ill. Rev. Stat. 1975, ch. 110A, par. 216(c).) The defendant withdrew these responses and filed a second set on March 15, 1976. Nothing further was done concerning these responses until November 16, 1976, the second day of trial, at which time the trial court granted plaintiff's

motion to declare the matters contained in five of the requests as admitted by defendant because of defendant's failure to give proper responses.

Rule 216(c) provides in part:

> "Each of the matters of fact***of which admission is requested is admitted unless, within 28 days after service thereof, the party to whom the request is directed serves upon the party requesting the admission either (1) a sworn statement denying specifically the matters of which admission is requested or setting forth in detail the reasons why he cannot truthfully admit or deny those matters or (2) written objections on the ground that some or all of the requested admissions are privileged or irrelevant or that the request is otherwise improper in whole or in part."

The defendant did not deny or object to the plaintiff's requests, therefore it was incumbent upon defendant to set forth in detail the reasons it could not admit or deny the matters. This it failed to do.

In *Banks v. United Insurance Co. of America* (1975), 28 Ill. App. 3d 60, 328 N.E.2d 167, this court stated that "[u]nless the party, to whom a notice to admit is directed, conforms his response to the framework provided by the Rule,***" the requested matters are admitted.

In the case before us, the defendant began its investigation immediately after the accident occurred, almost 3 years prior to trial. Its employees had performed numerous observation tests the results of which were readily available to it. Yet in spite of this the defendant continued to maintain at all material times that it could not admit these matters because its investigation was not completed.

Actually, the facts sought consisted of basic measurements, weights, braking distances, equipment used and results of the observation tests. The defendant's response to each of these requests was that its investigation was not complete and therefore it had "insufficient information to admit or deny the facts set forth***." The contention that these matters were not in the defendant's knowledge is incomprehensible. One of the requests asked the defendant to admit the stopping distance of Extra 2917 which fact had been stated in the FRSB report. Another request sought the admission of the results of defendant's observation tests which were also contained in the FRSB report. Still another request asked the defendant to admit that it did not have a derail device on the passing track at Wyatt. Each of these facts was within the defendant's knowledge.

We conclude that the defendant failed to conform its responses to Rule 216(c) and therefore the requested matters were properly admitted.

In its brief, defendant urges that the court erred in excluding additional testimony from Charles Bagby, defendant's engineer who had conducted the tests above described. The first point raised is an attempt to modify the distance stated in the tests above described as to the point at which the emergency brakes of the train should have been applied. As above shown, this was an improper attempt by defendant to modify its response to the admissions of fact. (*West Central Utilities Service Co. v. Central Illinois Public Service Co.* (1976), 42 Ill. App. 3d 5, 355 N.E.2d 349, *leave to appeal denied*, 65 Ill. 2d 580.) Secondly, defendant urges in its brief that the court erred in excluding evidence by the engineer regarding the distance from the point of impact at which the normal braking capacity of the engine should have been exerted. However, without considering the importance of this point, if

any, we reject this contention. The record shows that defendant made no offer of proof in this regard. We find no indication in this record that the court would have prevented the engineer from testifying about this matter. The court simply excluded testimony from the witness regarding matters already admitted. Thus, the question sought to be raised by defendant regarding application of the ordinary brakes was never presented to the witness or to the court.

Defendant also claims as error the trial court's refusal to instruct the jury as to the nontaxability of a damage award; to allow cross-examination of plaintiff's economist as to the nontaxability of an award; and, to allow defendant to introduce evidence as to the effects of income taxes on the decedent's future earnings. Numerous federal cases have been cited by defendant and *amicus* American Trial Lawyers Association. From a review of these cases it is apparent that the Courts of Appeals differ on the question of whether it is proper to instruct the jury as to the nontaxability of an award or to allow evidence as to the effects of taxation on future earnings. Compare *Burlington Northern, Inc. v. Boxberger* (9th Cir. 1975), 529 F.2d 284, *with Johnson v. Penrod Drilling Co.* (5th Cir. 1975), 510 F.2d 234, *cert. denied*, 423 U.S. 839.

The Supreme Court of the United States has not spoken on this issue. Absent an authoritative pronouncement by that Court we will follow the decisions of our own supreme court in *Raines v. New York Central R.R. Co.* (1972), 51 Ill. 2d 428, 430, 283 N.E.2d 230, *cert. denied*, 409 U.S. 983, and *Hall v. Chicago & North Western Ry. Co.* (1955), 5 Ill. 2d 135, 149–52, 125 N.E.2d 77, cited in *Saunders v. Norfolk & Western Ry. Co.* (1977), 54 Ill. App. 3d 307, 316, 369 N.E.2d 518. These decisions hold that it is not error to refuse to instruct a jury as to the nontaxability of an award. Based on these decisions we also conclude that it is not error to exclude evidence of the

effect of income taxes on future earnings of the decedent. These contentions are therefore rejected.

We next turn to the issues raised by defendant concerning damages. The decedent is survived by his wife and four minor children, two of whom are from a previous marriage. These latter two are twin girls and were 16 years old at the time of the occurrence. The remaining two children are both boys, one 3 years old and the other 4½ months old at the time of decedent's death.

The decedent was 37 years old and was earning approximately $13,000 per year. Increases would have raised his earnings to about $16,800 per year by 1977. The plaintiff's economist fixed the present value of the future loss to the decedent's family at $302,000. He used a life expectancy of roughly 34 years for the decedent. The economist was unable to value the elements of rearing, training, instruction, advice and guidance of the decedent's children. He knew of no statistics for placing a monetary value upon these elements.

The defendant claims that it was error for the trial court to instruct the jury that it could award damages for the pecuniary value of any loss to the children of "care, attention, instruction, training, advice and guidance" (IPI Civil No. 160.15), when no evidence of the value of such factors had been introduced. The defendant cites only one case in support of this proposition, *Petition of United States Steel Corp.* (6th Cir. 1970), 436 F.2d 1256, *cert. denied*, 402 U.S. 987. That case, however, was not concerned with the amount of evidence produced. The question there was whether *any* award for loss of guidance could be granted to the wives and adult children of the decedents. In that sense it is distinguishable from the case at hand.

The law in Illinois as to the sufficiency of the evidence to support an award for care and guidance is stated in *Allendorf v. Elgin, Joliet and Eastern Ry. Co.* (1956), 8 Ill. 2d 164, 180, 133 N.E.2d 288, *cert. denied*, 352 U.S. 833:

> "***we are of the opinion that it is unnecessary to undertake to prove the value of the financial loss of such care, etc., any more than it would be necessary to prove the value of pain and suffering or of inconvenience and annoyance when they are elements of damages. The jury should assess the value of such loss in the exercise of their best judgment based upon the facts of each case."

This decision has been followed in this court. *Lambdin v. Walter* (1968), 91 Ill. App. 2d 273, 233 N.E.2d 435; *Dodson v. Richter* (1962), 34 Ill. App. 2d 22, 180 N.E.2d 505.

The jury was presented with ample evidence of the care and guidance rendered by the decedent to his children prior to his death. There was evidence that the decedent was a family man who neither drank nor gambled. The record contains numerous references to his relation to his family. These indicate that the decedent spent a great part of his free time helping around the house and teaching the children needed skills. In addition, since the survivors of the decedent are his lineal kinsmen, a "presumption of pecuniary loss obtains from the relationship, alone, sufficient to sustain a verdict and judgment awarding substantial damages, without proof of actual loss." (*Baird v. Chicago, Burlington & Quincy R.R. Co.* (1976), 63 Ill. 2d 463, 471, 349 N.E.2d 413, quoting from *Howlett v. Doglio* (1949), 402 Ill. 311, 316, 83 N.E.2d 708.) The trial court properly left the determination of the value of these services to the jury.

The defendant's final assignment of error concerns the size of the award. The defendant claims that $775,000 is excessive in light of the testimony by plaintiff's economist that the

present value of the decedent's lost earnings only amounted to $302,000. We do not agree.

The Illinois Supreme Court has stated that the "amount of damages to be assessed is peculiarly a question of fact for the jury, and if the jury was properly instructed on the measure of damages, a reviewing court should not substitute its judgment for that of the jury as to the sum to be awarded." (*Baird*, 63 Ill. 2d 463, 472-73.) A reviewing court must "carefully scrutinize the record to determine [if the award] is so large as to indicate passion and prejudice." *Baird*, 63 Ill. 2d 463, 473.

As above stated, we believe the jury was properly instructed on the issue of damages, therefore our only task is to review the record to determine if the award was the result of passion and prejudice. After a thorough review of the record we do not believe it was.

Plaintiff's economist testified that he based the computation of lost earnings on a "conservative" estimate of future increases in the decedent's salary. Also, the projection by the economist did not include any amount for the loss of care and guidance to decedent's four children. Two of these children were under 5 years of age and will require substantial attention throughout the years of their minority. Each of these factors may have carried considerable weight in the deliberations of the jury. See *Allendorf*, 8 Ill. 2d 164, 179-80.

Furthermore, the trial court denied the defendant's motion for a new trial, or, in the alternative, for a substantial remittitur. Defendant had urged that the verdict was so grossly excessive as to indicate that the "deliberations of the jury were tainted by improper or prejudicial consideration." The trial court was in a better position that is this court on

review to determine whether the jury was moved by passion and prejudice. *Scully v. Otis Elevator Co.* (1971), 2 Ill. App. 3d 185, 201, 275 N.E.2d 905.

This court has previously upheld verdicts of similar magnitude. In *Scully*, this court upheld an award of $600,000 to a widow and two minor children. The testimony in that case showed the present value of the decedent's lost earnings in 1962—the year of the accident—to be $209,000. In the case before us, the present value of decedent's lost earnings was almost $100,000 more than in *Scully*; there are two more children here than in *Scully*; and almost 7 years have gone by since *Scully* was decided during which time inflation has greatly reduced the value of the dollar. Given these differences, we cannot say that this award is excessive absent any specific indication of passion and prejudice in the record.

For the foregoing reasons the judgment of the trial court is affirmed.

Judgment affirmed.

O'CONNOR, JR., and BUCKLEY, JJ., concur.

ORDER AND MANDATE OF THE ILLINOIS SUPREME COURT

United States of America

STATE OF ILLINOIS
SUPREME COURT } ss.

AT A TERM OF THE SUPREME COURT, begun and held in Springfield, on Monday, the thirteenth day of November in the year of our Lord, one thousand nine hundred and seventy-eight, within and for the State of Illinois.

PRESENT: DANIEL P. WARD, CHIEF JUSTICE
JUSTICE ROBERT C. UNDERWOOD
JUSTICE JOSEPH H. GOLDENHERSH
JUSTICE HOWARD C. RYAN
JUSTICE WILLIAM G. CLARK
JUSTICE THOMAS J. MORAN
JUSTICE THOMAS E. KLUCZYNSKI
WILLIAM J. SCOTT, ATTORNEY GENERAL
LOUIE F. DEAN, MARSHAL
ATTEST: CLELL L. WOODS, CLERK

BE IT REMEMBERED, that, to-wit: on the 30th day of November 1978, the same being one of the days of the term of Court aforesaid, the following proceedings were, by said Court, had and entered of record, to-wit:

KANDYTHE J. LIEPELT,
Administratrix of the Estate of
Delroy Liepelt, Deceased,
Respondent

No. 51115 *vs.*

NORFOLK AND WESTERN RAILWAY
COMPANY, a corporation,
Petitioner

Petition for Leave to
Appeal from Appellate
Court First District
77-677

And now on this day the Court having duly considered the Petition for Leave to Appeal herein and being now fully advised of and concerning the premises, doth overrule the prayer of the petition and denies Leave to Appeal herein.

And it is further considered by the Court that the said Respondent recover of and from the said Petitioner costs by her in this behalf expended, to be taxed, and that she have execution therefor.

I, CLELL L. WOODS, Clerk of the Supreme Court of the State of Illinois and keeper of the records, files and Seal thereof, do hereby certify that the foregoing is a true copy of the final order of the said Supreme Court in the above entitled cause of record in my office.

IN WITNESS WHEREOF, I have hereunto subscribed my name and affixed the Seal of said Court this 26th day of December, 1978.

(SEAL)

/s/ CLELL L. WOODS,
Clerk,

Supreme Court of the State of Illinois.

EXCERPTS FROM THE TRIAL RECORD

(R 664) MR. FLEISHER: Your Honor, the Plaintiff is called an economist and I would like to make an oral motion in limine at this time.

I am certain Mr. White knows there can be no mention of income tax under Illinois law and I refer specifically to the

case of Hall vs. The Chicago & North Western Railway Company.

THE COURT: May I suggest, sir, that you examine your witness first. Then after I have a chance to digest what his testimony has been, I will entertain your motion in limine with regard to Mr. White's cross-examination.

I don't know what you're going to bring out, so I can't anticipate what his cross will be.

MR. FLEISHER: All I am going to bring out, nothing as to any type of State or Federal law income tax, which is the Illinois law, and I know Mr. White is aware of it.

(R 665) THE COURT: If you're not going to bring out anything along those lines, of course you can't cross-examine on anything you haven't touched upon, but let's see what his testimony is going to be first, please.

* * *

(R 710) THE COURT: . . . .

So your next question, Mr. White.

(R 711) MR. WHITE: Well, any questions, I would like to be heard on. It will be along the lines that Counsel made the motion on before he put the witness on the stand.

THE COURT: The jury will be excused for a moment.

(Whereupon, the following proceedings were had in open court, out of the presence of the jury.)

MR. WHITE: I think this should be outside the presence of the witness.

THE COURT: You are excused, sir.

Henry, do you want to show the Professor back to my chambers and make him comfortable.

(Whereupon, the witness left the witness stand.)

MR. WHITE: If the court please, Dr. Friedman mentioned in the course of his testimony something about income tax. I forget exactly what it was,

At any rate, the—I propose to and ask leave to ask him if he's taking into account (R 712) the fact that any amount recovered, either for death benefits or for injury, damages, is not subject to any income tax, which is a big difference.

THE COURT: That has been frowned upon consistently by Illinois Courts, as has reference to insurance.

A reference to insurance giving rise to motions for non-suit and references to freedom from income tax responsibility cases of recovery for injuries and deaths such as this are each entitled to swift response by way of granting of a motion for mistrial.

I am delighted that you asked your question and made your comment out of the presence of the jury, and I commend you for that, Mr. White.

However, if your objection in going into the area of income tax deals with the amount of tax that might be recoverable by the Government from the verdict amount, if one is returned in this cause, then the motion in limine is sustained.

MR. WHITE: I wasn't going to put it exactly that way. I was going to ask him if he took into (R 713) account in his computations that any amount paid in damages is not subject to income tax.

THE COURT: And that would give rise to an immediate motion for mistrial and I would have to grant it.

And consequently the motion in limine is sustained.

MR. WHITE: May it stand as an offer of proof?

THE COURT: Of course. It isn't necessary.

Let the record show that if you were to ask this man whether he knows if any recovery granted by the jury herein was subject to income tax or not, his answer would have to be that there will be no tax paid on any recovery.

I think that all parties here would stipulate that that is what his answer would be.

MR. WHITE: That is the law.

THE COURT: Yes, that is the law.

* * *

(R 738) THE COURT: Mr. White, you got a motion?

MR. WHITE: Yes. If the Court please, the Defendant wishes to make another motion to . . . declare a mistrial.

This one—

THE COURT: I don't know that you had made such a motion heretofore, Counsel.

. . . .

This one is that the Court erred in allowing Plaintiff's motion in limine, and in not permitting to ask the economist yesterday with reference to income taxes.

. . . .

(R 751) MR. LANDESS: . . . (R 752)

Counsel has referred to the I.P.I. Instructions that apply to cases of this nature, and cited 160 and those following. My recollection of the appropriate instructions refers to the fact that a jury may take into consideration in finding an award of damages or amount of damages, deductions that would have been taken from the earnings or the income of the Decedent. They mention deductions specifically in that instruction.

So on the one hand Plaintiff is allowed to put on an economist who can testify and project into the future what the earnings of the Decedent may be. On the other hand, the Defendant is precluded from showing what the deductions from those gross earnings would be.

(R 753) We can't show with any certainty what those deductions are. We're precluded. It's really not a fair position of the Plaintiff in this case.

. . . .

I submit that the jury would have no reasonable rationale basis to arrive at an award here unless they are able to hear both sides of the story, not just one, not what he would earn but what he would have to pay out of that.

When Counsel says this may be insignificant or small, that is not true. That is what Boxberger is telling us here. They do make a decision. This may not be true in all cases.

(R 754) If a man has an income of only a thousand dollars, well, income taxes are going to be insignificant, and I think the McQueen Case decision, as mentioned in Boxberger, this

knowledge, this will have no impact, but Boxberger and Cox say when you're getting into the $15,000 area, which we are in this case, as I understand from the testimony and as I have learned from the economist, that this will have a substantial impact, and our calculations show that it will have a substantial impact as to what they would actually realize.

I think that the Defendant is seriously prejudiced if he cannot, and we have not had that opportunity to show what deductions are. When a jury's given an instruction to say that they can consider deductions from this, and yet isn't given any evidence to show what those deductions may be, I submit that we have been prejudiced, Judge.

. . . . (R 755)

MR. FLEISHER: Your Honor, there are a couple of things that seem to be changing here. First of all, the items under I.P.I. that a jury may consider are those of personal use or consumption, those that are expenditures.

There's nothing in I.P.I. that allows the jury to consider the effect of income tax, (R 756) Federal, State, by being any type of deductions.

Secondly, Mr. White's objection, when he asked to question this economist, was what the effect would be on taxation on this award, whatever it may be.

Now, as I understand Mr. Landess, they are going one step beyond that. Now they are asking that the economist be allowed under Illinois law to be questioned and testify as to the man's deductions for income tax.

MR. LANDESS: No, no, no, no, no, Counsel.

I—I don't mean to interrupt, but that was not my point at all.

May I proceed?

MR. FLEISHER: Why, sure.

MR. LANDESS: When I said: "deductions," my understanding of the I.P.I. is that the jury may consider what deductions—not tax deductions, Mr. Fleisher, but what deductions may be taken from the overall—from the gross, and obviously one of the deductions that would be taken would be the income tax.

I didn't mean to imply what deductions (R 757) he would under the income tax.

MR. FLEISHER: That is specifically another element, as opposed to what Mr. White raised in his objection.

Mr. White asked that he be allowed to question the economist in regard to what effect if any, taxation would have on an award by this jury, whether any of this money was subject to a taxation that a jury might give, or they might receive.

Today's objection is that this money from his earnings will be or would have been in the future is subject to going into the question of taxation. So that what we're doing specifically, is overruling Illinois law, specifically overruling I.P.I. and allowing a whole new area of questioning every single potential litigant who has a future wage loss as to what taxes would have been on those wages, or that wage loss.

The reason that it has never been allowed under Illinois law, and in the number of Federal jurisdictions, and other states as well, you get into complete and total speculation.

(R 758) Who knows? In yesterday's paper, President-elect Carter is considering a major tax cut to take effect in 1977 right after he takes office.

THE COURT: All right. All arguments must end somewhere, and I'm about to have an end. And the ruling of yesterday will stand.

* * *

(R 1091) THE COURT: It seems the defense had a motion?

MR. WHITE: If the Court please, on behalf of the defendant I wish to make an offer of proof.

THE COURT: Proceed.

MR. WHITE: If we called an actuary by the name of Robert Barns (*sic*) he would qualify as trained, experienced actuary and that using work life expectancy tables with the decedent's age at death of 37.51 years, a period of calculation to date, 12-1-76, 3.02 years, period of further earnings 22.42 years, and he would deduct income taxes, State and Federal, amount to $57,000. In his computations and if he used a six percent interest rate the pecuniary interest of the survivors would be, total a hundred—present value would be $115,325.

THE COURT: A hundred fifteen thousand what?

MR. WHITE: $325.

Two, that he could use or he could (R 1092) testify that he worked primarily with pension funds, eighty-one and-a-half percent interest and including a five percent increase in future earnings, his present pecuniary value to survivor would be $138,327.

THE COURT: In other words, that's eight and three-quarters percent as opposed to eight percent?

MR. WHITE: Yes, that's right.

THE COURT: That figure came to what?

MR. WHITE: $138,327.

THE COURT: Thank you.

MR. WHITE: The reason I am making this as an offer is because of your Honor's previous ruling with reference to income tax.

THE COURT: Thank you, sir.

Anything else, gentlemen?

MR. WHITE: We would ask that he would also testify that fringe benefits should not be computed because they are continuing.

THE COURT: All right.

MR. FLEISHER: Your Honor, if I may, is this offer of proof being made in lieu of the testimony of this witness?

(R 1093) THE COURT: Apparently so. I understand it to be that way in light of the Court's ruling with regard to income taxes.

Mr. White has very properly made this statement for the record by way of an offering of proof as opposed to attempting to bring it out before the Jury which would not be possible in light of my prior ruling.

* * *

(R 1262) THE COURT: . . . . (R 1263) Now, we'll go to 19 and, of course, 19 will be rejected for reasons argued at length in the earlier part of the trial.

MR. WHITE: What's that?

MR. LANDESS: Taxes.

THE COURT: Income tax.

(RC 200) If your verdict is in favor of plaintiffs, your award will not be subject to any income taxes, and you should not consider such taxes in fixing the amount of your award.

DEFENDANT'S INSTRUCTION NO. 19 (REJECTED)

Dempsey v. Thompson, 363 Mo. 339, 251 S.W.2d 42 (1952)

Burlington Northern, Inc. v. Boxberger, 529 F.2d 284 (CA 9, 1975)